

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL)	NO. 49521-0-II
RESTRAINT PETITION OF)	
)	STATE'S SUPPLEMENTAL
)	RESPONSE TO
MARVIS J. KNIGHT)	PERSONAL RESTRAINT
)	PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Joseph J.A. Jackson, Deputy Prosecuting Attorney, and files its supplemental response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. STATEMENT OF THE CASE

The procedural and substantive facts of the case, including the basis for the current restrictions on Knight's liberty, were set forth in the State's original response to this PRP, including the appendices, and will not be repeated in this supplemental response.

Following the filing of the State's first response brief, this court appointed counsel for Knight. Counsel filed a supplemental brief. The issues presented are whether the judgment and sentence is

facially valid following Knight's plea to Attempted Manslaughter in the First Degree and whether Knight has shown actual and substantial prejudice based on his plea to Attempted Manslaughter in the First Degree.

II. RESPONSE TO ISSUES RAISED

- A. The Judgment and Sentence is facially valid and based on a very beneficial plea bargain that was negotiated on Knight's behalf.

As argued in the original response, Washington State courts have upheld a plea to an offense that would not have been supported at a jury trial in the context of a guilty plea. State v. Majors, 24 Wn.App. 481, 603 P.2d. 1273 (1979). In upholding the benefit of the bargain that was reached by the parties, the Majors court cited to persuasive precedent from the State of New York. Id. at 483. In People v. Foster, the New York Court of Appeals addressed the same situation that exists in this case. Foster, 19 N.Y.2d 150, 225 N.E.2d 200 (1967). In addressing the question of whether a plea to attempted manslaughter renders a plea "inoperative, illogical or repugnant, and therefore invalid," the Foster court stated, "We hold that it does not when a defendant knowingly accepts a plea to

attempted manslaughter as was done in this case in satisfaction of an indictment charging a crime carrying a heavier penalty.” Id. at 153.

Relying on the logic of Foster, the Majors court held that Majors entered a guilty plea to a reduced charge to avoid the risk of the greater charge and received the benefit of his bargain. Majors, 24 Wn.App. at 483. The Washington State Supreme Court affirmed Majors conviction. State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980).

Similar logic has been used to uphold plea agreements in cases throughout the United States. In People v. Genes, 58 Mich.App 108, 227 N.W.2d 241 (1975), the Michigan Court of Appeals considered a challenge brought after a defendant, who had been charged with murder, pled guilty to attempted manslaughter. The court noted. “a guilty plea to an attempt charge entered as part of a plea bargain may be accepted even though a jury conviction on the same charge might be reversed.” Id. at 111. In Torres v. McGrath, 407 F.Supp.2d 551 (2006), the United States District Court for the Southern District of New York, noted that “the crime of attempted reckless endangerment is nonexistent, as the concept of intent—

required for attempt is inconsistent with the concept of recklessness.” Torres, 407 F.Supp.2d at 561. While recognizing that the crime of attempted reckless endangerment could not be submitted to a jury, the court found “where a defendant pleads guilty to such a crime as part of a negotiated compromise, thereby gaining the benefit of a lesser sentence, there is no constitutional infirmity.” Id. at 562.

In Louisiana, a defendant who was originally charged with armed robbery and aggravated battery, pleaded guilty to attempted manslaughter and despite the fact that the court noted that the plea was to a crime “nonresponsive to the original indictment” the Court found that “if a defendant acknowledges the content of a plea agreement and makes a voluntary and intelligent decision with the aid of an attorney, but still enters a guilty plea, then the sentence is not reviewable by an appellate court.” State v. Silvie, 721 So.2d 998, 999 (1998). The State of Kansas has also recognized the validity of plea agreements in similar situations. See, McPherson v. State, 38 Kan.App.2d 276, 163 P.3d 1257 (2007)(a defendant’s plea to attempted second-degree unintentional murder affirmed because the plea was for a favorable plea bargain and the defendant’s plea was

knowing and voluntary); Spencer v. State, 24 Kan.App.2d 125, 942 P.2d 646 (1997)(Despite finding that under Kansas law there is no such crime as attempted aggravated assault, the court affirmed a conviction holding that a criminal defendant who was originally brought into court on a valid pleading might pursuant to a beneficial plea agreement plead guilty to a nonexistent crime).

In the context of jury instructions for lesser included offenses, this court has found that the crime of attempted manslaughter does not exist. State v. Red, 105 Wn.App. 62, 66, 18 P.3d 615 (2001); *review denied*, 145 Wn.2d 1036, 43 P.3d 20 (2002). In Red, the court noted that “manslaughter is not a specific intent crime and does not require an intent to cause a particular result. In fact, if the defendant intends to kill, he is guilty of murder not manslaughter.” Id. Based on that conclusion, the Court found that trial counsel was not ineffective for failing to propose lesser included jury instructions. Id. at 66-67.

State v. Red did not address the issue before this court. While it is true that attempted manslaughter does not exist as a lesser included of attempted murder, the charge of attempted manslaughter can be supported in a beneficial plea agreement. While the offense

could not be presented to a jury, a trial judge can accept a guilty plea and find that based on facts that would have been sufficient to prove intent, the elements of attempted manslaughter are met.

The crime of Manslaughter in the First Degree requires that the defendant recklessly cause the death of another person. RCW 9A.32.060. A person acts recklessly if a person acts intentionally or knowingly. State v. Holznecht, 157 Wn.App. 754, 238 P.3d. 1233 (2010). Therefore, when a person is charged with the intentional crime of Assault in the First Degree, the trial court can rely on the facts alleged to support a negotiated for resolution to the crime of Attempted Manslaughter. This is true even though the charge may not have been presented had the matter proceeded to a jury trial.

In his Supplemental Brief, Knight bases his claim that the judgment and sentence issued in this case is facially valid on In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). Hinton dealt with the very specific situation where all of the parties based the crime of felony murder on the erroneous assumption that felony murder could be predicated upon an assault. Because the conduct that had been alleged and proven, was not criminal pursuant

to the felony murder statute, the court overturned convictions which were based on assault as a predicate offense to felony murder. Id. at 860-862.

While some of the cases in Hinton had pleas of guilty, the Court did not discuss the effect of negotiations. The Court focused only on the fact that the facts upon which the convictions were based only supported an erroneous reading of the RCW. It is clear in that case that any pleas were not knowingly entered.

Unlike, the charge of felony murder predicated on assault as addressed in Hinton, both RCW 9A.32.060, Manslaughter in the First Degree and RCW 9A.28.020, Criminal Attempt, were valid law at the time of Knight's plea. Knight knowingly entered a plea to attempted manslaughter in the first degree. The fact that the intent necessary for attempt and the reckless standard in the manslaughter charge may be somewhat illogical or inoperative does not negate the negotiated for resolution.

This case is much more like Majors and other cases which have upheld similar plea agreements around the country in that Knight knowingly and intelligently entered a negotiated resolution and

obtained the benefit of a greatly reduced sentence. As the court noted in Majors, and as the State noted in its original response,

“It would create an intolerable situation if defendants, after conviction, could defer their attacks upon indictments or informations until witnesses had disappeared, statutes of limitation had run, and those charged with the duty of prosecution had died, been replaced, or had lost interest in the cases.”

Majors, 94 Wn.2d at 358-59; *citing Keto v. United States*, 189 F.2d 247, 251 (8th Cir. 1951).

Looking at all of the facts and circumstances surrounding Knight’s conviction, the conviction was based on a valid plea agreement that was negotiated by Knight with the assistance of counsel and secured a resolution substantially more favorable than he could have faced had he proceeded to trial. The conviction is facially valid and therefore his petition is time barred pursuant to RCW 10.73.090. Knight got the benefit of the bargain that he reached with the State and this court should not entertain this challenge to the resolution that he negotiated for now more than twenty years after the fact.

- B. The State was incorrect in its argument that this case was not counted as a predicate offense for sentencing as a persistent offender in Cause No. 99-1-00929-4.

In our original response, the State erroneously argued that Knight's attempted manslaughter conviction was not a basis for his current confinement as a persistent offender in Cause No. 99-1-00929-4. The transcript of proceedings in Cause No. 99-1-00929-1 makes it clear that the court counted the attempted manslaughter in the first degree conviction from Cause No. 95-1-00199-1 as one of the 2 prior strike offenses relied upon in finding that Knight was a persistent offender. Verbatim Report of Proceedings, Thurston County Cause No., 99-1-00929-4; April 18, 2000 at 30; 2 RP 30.

RCW 9.94A.030(38), in part, defines a persistent offender as an offender who has been convicted of any felony considered a most serious offense and has before the commission of the offense, been convicted on at least two separate occasions of felonies that under the laws of this state would be considered most serious offenses. A most serious offense means any of a list of felonies or a felony attempt to commit any of the list of felonies contained in RCW 9.94A.030(33). Manslaughter in the first degree is contained in the list. RCW 9.94A.030(33)(k). As such a felony attempt to commit manslaughter in the first degree is a strike offense and was properly

considered as a prior strike in Cause No. 99-1-00929-4.

It is undisputed that Knight is currently serving a life sentence as a persistent offender for his 1999 conviction. His plea to attempted manslaughter in the first degree is not the reason for his current situation. It is clear that that Knight's attorney negotiated tenaciously for the offer of attempted manslaughter. Appendix A to Petition at 34-41. Knight got a very good deal. He faced a recommendation of 38 months, even as an exceptional sentence upward, rather than the 93 to 123 months he was facing if convicted at trial of the original charge. Appendix A to Petition at 35. He was not prejudiced by his negotiate resolution.

But for his subsequent convictions, Knight would have completed all of the terms and been free of the restraints from his conviction for attempted manslaughter long ago. The only prejudice that Knight appears to show from his 1995 case seems to be that his negotiated resolution allowed him to serve a significantly shorter prison term such that he was not incarcerated and able to commit second degree robbery in 1997 before committing the two second degree assaults and two felony harassments that resulted in his life

sentence.

While his attempted manslaughter conviction did count as a prior strike in Cause no. 99-1-00929-4, Knight negotiated for the resolution and successfully had the charge reduced from Assault in the First Degree, which is also a strike offense. RCW 9.94A.030(33)(a). He should be held to the beneficial resolution that he reached. This court should not overturn a negotiated resolution simply because Knight failed to take advantage of the benefit he received and continued committing serious offenses which have ultimately led him to his current incarceration.

IV. CONCLUSION

Knight's conviction for attempted manslaughter is facially valid and was entered pursuant to a beneficial plea agreement. As such, he has failed to show that error occurred, and even if error occurred, his Petition is time-barred. As such, the State respectfully requests

that this court dismiss Knight's personal restraint petition.

RESPECTFULLY SUBMITTED this 30 day of September, 2017.

JON TUNHEIM
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "J. Jackson", is written over a horizontal line.

Joseph J.A. Jackson, WSBA #37306
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of State's Supplemental Response to Personal Restraint Petition on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 4th day of October, 2017, at Olympia, Washington.


JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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